NO. 2015-CA-00190-SCT

IN THE SUPREME COURT OF MISSISSIPPI

JERRY WAYNE ATWOOD,

Appellant,

vs.

STATE OF MISSISSIPPI,

Appellee.

On Appeal from the Circuit Court of Wayne County, Mississippi

REPLY BRIEF OF THE APPELLANT

Oral Argument Requested

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INTRODUCTION

The State contends that "[t]his case is not about the skyrocketing costs of incarceration in the Mississippi Department of Corrections (MDOC)[,] … [i]t is about the revocation of [post-release supervision]." Appellee's Br. at 6. But as the Legislature discovered after conducting a thorough review of the state's corrections and criminal justice systems, the costs of incarceration and the revocation of supervision are intimately intertwined. *See e.g.,* Miss. Corr. and Crim. Justice Task Force, *Final Report*, 9 (Dec. 2013), *attached to* Appellant's Br. as Append 4 (hereinafter "*Final Report*"). Indeed, the Legislature learned that more people were entering the MDOC from a revocation of supervision than from a new criminal sentence. *See id*. Moreover, the vast majority of people who were entering prison from a revocation of supervision were being revoked for "technical" violations, rather than for committing new crimes. *See id*. The Legislature also reviewed data that suggests that long prison sentences for nonviolent offenders *increases* recidivism, thereby making society less safe. *See id*. at 8.

The question in this case is whether the Legislature – which authorized circuit courts to impose and revoke terms of post-release supervision in the first place – may seek to control the costs of incarceration and improve public safety by amending Miss. Code Ann. § 47-7-37 to reduce the statutorily authorized penalties for certain violations of the conditions of post-release supervision. Rather than imposing a period of imprisonment within the range authorized by the amended statute, the Circuit Court held that the Legislature's 2014 amendments to Section 47-7-37 are unconstitutional pursuant to Article 1, Sections 1 and 2 of the Mississippi Constitution and ordered that the

appellant, Jerry Atwood, be imprisoned for a period of nine years and eleven months. This term of imprisonment exceeds the maximum penalty authorized by the amended statute by approximately *nine years and eight months*. Alternatively, the Circuit Court maintained that another statute, Miss. Code Ann. § 99-19-29, independently authorized the court to revoke Mr. Atwood's term of post-release supervision and impose a period of imprisonment.

The State has made no real effort to defend the Circuit Court's ruling that the amendments to Section 47-7-37 are unconstitutional. Moreover, the State has conceded that a circuit court may not rely upon Section 99-19-29 to revoke a term of post-release supervision. *See* Appellee's Br. at 8-9.[1] Essentially abandoning the Circuit Court's stated justifications for its actions, the State's argument – which was not mentioned by the Circuit Court and is raised by the State for the first time on appeal – is that the Circuit Court was not bound by the amendments to Section 47-7-37 because "[t]he graduated sentencing to [a] technical violation center provided for in Section 47-[7]-37 *does not apply* to a revocation of [post-release supervision]." *Id*. at 5 (emphasis added). As discussed below, however, this argument does not hold water. It has long been established that Section 47-7-37 provides the procedures *and* substantive penalty for violations of post-release supervision. Furthermore, a review of House Bill 585 – the comprehensive 2014 criminal justice and corrections reform bill that amended Section

[1] *See, e.g.,* Appellee's Br. at 8 ("To the extent that the Circuit Court claims it is authorized to revoke a suspended sentence by Miss. Code Ann. § 99-19-29, the state respectfully submits this section does not apply to the case at hand. … [W]e are dealing with PRS and not just a suspended sentence."). *See also* Appellant's Br. at 21-23 (explaining why Section 99-19-29 does not authorize a circuit court to impose or revoke a term of post-release of supervision).

47-7-37 – makes abundantly clear that the Legislature intended for the amended penalty provisions to apply to violations of post-release supervision.

The State's position on the constitutionality of the amendments to Section 47-7-37 remains unclear. On the one hand, the State claims to "adopt[] by reference and incorporate[] herein the constitutional argument set forth in Sections III through V of the … response of the District Attorney of the 10[th] Circuit Court District." Appellee's Br. at 8.[2] On the other hand, the State claims that "[*a*]*fter making appropriate internal ethical considerations*, we will … file[] a supplemental brief concerning this issue, if requested by this Court." *Id*. at 8, n.1 (emphasis added). The argument of the District Attorney – that the amendments to Section 47-7-37 somehow impinged upon the power of the Circuit Court to enforce an order – was adopted by the Circuit Court and addressed at length in our primary brief. *See* Appellant's Br. at 12-21. We will not waste the Court's time by rehashing arguments in this Reply Brief that the State has declined to address in its Response Brief.

The State's conditional request to file a supplemental brief regarding the constitutionality of the amendments should be denied. The State has had ample opportunity to engage in "appropriate internal ethical considerations" regarding whether to defend the Circuit Court's ruling that the amendments are unconstitutional. The Notice of Appeal, which was filed *more than seven months ago*, specifically notes that

[2] A copy of the Response filed by the District Attorney in the circuit court proceedings is attached to the State's Response Brief. The State also summarizes the District Attorney's argument at pages 4-5 of its Response Brief. *See* Appellee's Br. at 4 ("The District Attorney … claimed … [that] [t]he adoption of HB 585 was patently an attempt by the legislature to override the authority of the court to enforce its own sentencing order that had been entered prior to the adoption of said act.").

"Mr. Atwood appeals the Circuit Court's holding that Miss. Code Ann. § 47-7-37, as amended by the Legislature in 2014, violates the Constitution of the State of Mississippi when applied to Mr. Atwood." Not. (filed Feb. 4, 2015). Moreover, this case was re-called from the Court of Appeals after undersigned counsel filed a motion contending that the case is within exclusive jurisdiction of this Court because it involves an appeal from "a trial court's holding a statute unconstitutional." Mot. at 1 (filed May 13, 2015) (citation omitted). The State has also sought and received three extensions of time to file its response brief, which was initially due on June 22, 2015. Mr. Atwood – who remains incarcerated – should not have to bear the burden of the State's choice to put off a decision that ought to have been made months ago.[3]

STANDARD OF REVIEW

The State's new argument that the amendments to Section 47-7-37 do not apply to revocations of post-release supervision raises a question of law that is reviewed *de novo*. *See, e.g., Brown v. State*, 168 So.3d 884, 892 (Miss. 2015) (citation omitted). With respect to the Circuit Court's ruling that the amendments to Section 47-7-37 are unconstitutional: "[This Court also applies] a *de novo* standard of review, bearing in mind (1) the strong presumption of constitutionality; (2) the challenging party's burden to prove the statute is unconstitutional beyond a reasonable doubt; and (3) all doubts are resolved in favor of a statute's validity." *Johnson v. Sysco Food Services*, 86 So.2d 242, 243-44 (Miss. 2012) (footnotes and citations omitted).

[3] It is also unclear what "ethical considerations" might prevent the State from filing its own argument, but allow it to "adopt[] by reference and incorporate[]" the argument of the District Attorney. Appellee's Br. at 8.

ARGUMENT

Section 47-7-37 Provides the Procedures and the Substantive Penalty for Violations of Post-Release Supervision.

Instead of defending the Circuit Court's ruling that the amendments to Section 47-7-37 are unconstitutional, the State urges this Court to conclude that "[t]he graduated sentencing to [a] technical violation center provided for in Section 47-[7]-37 *does not apply* to a revocation of PRS under Section 47-7-34(2)." Appellee's Br. at 5 (emphasis added). The State contends that, "[a]fter following the procedures of 47-7-37 and determining a defendant failed to successfully abide by the terms and conditions, the court should look back to 47-7-34(2) for the revocation sentence." *Id*. at 7. The State's argument fails, however, because it has long been established that Section 47-7-37 provides the procedural requirements and substantive penalties for revocations of post-release supervision. Moreover, the Legislature has made it abundantly clear that it intended for Section 47-7-37's amended penalty provisions to apply to revocations of post-release supervision.

There should be no question – and the State does not dispute – that courts must look to Section 47-7-37 for the proper *procedures* for revoking a term of post-release supervision. The post-release supervision statute, Section 47-7-34(2), states:

> The period of post-release supervision shall be conducted in the same manner as a like period of supervised probation, including a requirement that the defendant shall abide by any terms and conditions as the court may establish. Failure to successfully abide by the terms and conditions shall be grounds to terminate the period of post-release supervision and to recommit the defendant to the correctional facility from which he was previously released. Procedures for termination and recommitment shall be conducted in the same manner as procedures for the revocation of probation and

> imposition of a suspended sentence as required pursuant to Section 47-7-37.

(Emphasis added). Indeed, the Legislature re-affirmed the relationship between Sections 47-7-34 and 47-7-37 when it added the above-emphasized phrase, "as required pursuant to Section 47-7-37," to Section 47-7-34(2) through House Bill 585 in 2014. Moreover, since the Legislature created post-release supervision in 1995, Section 47-7-37 has included the following provision, which is now located in paragraph (9) of the statute: "The arrest, revocation and recommitment procedures of this section also apply to persons who are serving a period of post-release supervision imposed by the court." Miss. Code Ann. § 47-7-37(9) (rev. 2014). *See also* S.B. 2175, 1995 Leg. Reg. Sess. (Miss. 1995) (creating post-release supervision and, among other things, amending Section 47-7-37).

The courts of this state – including the Court of Appeals – have long understood that the "*recommitment procedures*" detailed in Section 47-7-37 also define the maximum *substantive penalty* that may be imposed when a term of post-release supervision is revoked. As the Court of Appeals explained in *Johnson v. State*, 802 So.2d 110, 112 (Miss. Ct. App. 2001):

> [F]or the purposes of dealing with the issue of the revocation and the proper allowance of time served, the procedures are governed just as those for supervised probation. *See* Miss. Code Ann. §§ 47-7-34(2) & 47-7-37 (Rev. 2000). With this in mind, § 47-7-37 states:
>
> > Thereupon, or upon an arrest by warrant as herein provided, the court, in term time or vacation, shall cause the probationer to be brought before it and may continue or revoke all or any part of the probation or the suspension of sentence, and may cause the sentence

> imposed to be executed or may impose any part of the sentence which might have been imposed at the time of the conviction.

(Emphasis added). *See also Sobrado v. State*, 168 So.3d 1114, 1119 (Miss. Ct. App. 2014) (emphasis added) (citing Section 47-7-37 for the proposition that a circuit court has "authority to revoke an offender's post-release supervision and 'impose any part of the sentence [that] might have been imposed at the time of conviction.'"); *Lott v. State*, 115 So.3d 903, 908 (Miss. Ct. App. 2013) (emphasis added) (citing Section 47-7-37 for the proposition that when a person is arrested for a violation of post-release supervision "'the court … shall cause the probationer to be brought before it and may … revoke all or any part of the probation or the suspension of sentence, and may cause the sentence imposed to be executed or may impose any part of the sentence which might have been imposed at the time of the conviction."); *Brown v. State*, 872 So.2d 96, 99 (Miss. Ct. App. 2004) (emphasis added) ("Post-release supervision revocation is to be followed just as probation according to Mississippi Code Annotated Section 47-7-34(2), and under the probation revocation statute Mississippi Code Annotated Section 47-7-37, any sentence suspended that could be imposed at the time of sentencing can be imposed on a showing that the petitioner has violated the terms of his probation."); *Hunt v. State*, 874 So.2d 448, 454-55 (Miss. Ct. App. 2004) (Southwick, P.J., concurring) (emphasis added) (noting that "[t]he same 1995 Act that created the status of post-release supervision and provided that the conditions would be the same as for probation, also made identical the effect of violating those conditions," and citing Section 47-7-37 for the proposition that, "when either a probationer or someone under post-release supervision has that status revoked,

the circuit judge 'may cause the sentence imposed to be executed or may impose any part of the sentence which [might] have been imposed at the time of the conviction.'"). The Circuit Court in this case also clearly understood that Section 47-7-37 provides the substantive penalty for violations of post-release supervision. *See, e.g.,* R.E. 2 at 75-76. Indeed, if not for that understanding the Circuit Court would not have had any reason to declare that the amendments to the statute are unconstitutional.[4]

When the Legislature amended Section 47-7-37 through House Bill 585 in 2014 it modified the maximum term of imprisonment that may be imposed for certain violations of the conditions of post-release supervision (and probation) as follows:

> …If the court revokes probation for a technical violation, the court shall impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety (90) days for the first technical violation and not to exceed one hundred twenty (120) days for the second technical violation. For the third technical violation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent technical violation, the court may impose up to the remainder of the suspended portion of the sentence.

[4] The State notes that "[n]o where (sic) in the revocation order does the Circuit Court conclude that Atwood committed a 'technical violation' of the conditions of his PRS, as Atwood alleges." Appellee's Br. at 7 (citation omitted). But the Circuit Court clearly understood that Mr. Atwood's failure to complete the restitution center program was a "technical violation" of the conditions of his post-release supervision or the court would not have had any reason to declare that the amendments to Section 47-7-37 are unconstitutional. *See, e.g.,* R.E. 2 at 75-76. Regardless of how the Circuit Court labelled Mr. Atwood's violation, it was clearly a "technical violation" as defined by Miss. Code Ann. § 47-7-2(q). *See id*. ("'Technical violation' means an act or omission by the probationer that violates a condition or conditions of probation placed on the probationer by the court or the probation officer."). *See also Final Report* at 9, *attached to* Appellant's Br. as Append 4 ("In FY2012 … the vast majority of offenders revoked to prison were not admitted for engaging in new criminal activity but rather for failing to comply with the terms of their supervision sentence. These revocations are called 'technical revocations' and include conduct like missing drugs tests or failing to report to probation officers.").

Miss. Code Ann. § 47-7-37(5)(a). When the Legislature amended Section 47-7-37, it did not indicate that the courts had misinterpreted the relationship between Sections 47-7-34 and 47-7-37, nor did it suggest that it intended to change that relationship in any way. *See McDaniel v. Cochran*, 158 So.3d 992, 1000 (Miss. 2014) ("The Legislature is assumed to be aware of judicial interpretations of its statutes[.] … [A]bsent legislative action, [these interpretations] become a part of the statute."). To the contrary (and as noted above), the Legislature re-affirmed the existing relationship between the statutes when it added the phrase, "as required pursuant to Section 47-7-37," to the last line of Section 47-7-34(2). Thus, Section 47-7-37 *continues* to provide the procedures and substantive penalties for revocations of post-release supervision.

Indeed, if there was any question about whether the Legislature intended for the amended penalty provisions in Section 47-7-37 to apply to revocations of post-release supervision – and there should be none – that question is resolved by examination of other provisions of House Bill 585. *See Owens Corning v. Mississippi Ins. Guar. Ass'n*, 947 So.2d 944, 946 (Miss. 2007) ("In determining the proper construction of a statute, the entire legislation on the subject matter, its policy, reason, as well as the text, must be considered.") (citation omitted). For example, Section 66 of House Bill 585, which is codified at Miss. Code Ann. § 47-5-11, provides in pertinent part that:

> (1) The Mississippi Department of Corrections shall collect the following information: …
>
> (c) Post-release supervision data shall include: …

> (iii) The number of post-release probationers revoked for a technical violation and sentenced to a term of imprisonment in a technical violation center[.]
>
> (2) The Department of Corrections shall semiannually report information required in subsection (1) of this section to the Oversight Task Force, and upon request, shall report the information to the PEER Committee.

(Emphasis added).[5] If, as the State contends, "[t]he graduated sentencing to [a] technical violation center provided for in Section 47-[7]-37 does not apply to a revocation of PRS under Section 47-7-34(2)," Appellee's Br. at 5, there would be no need for the Legislature to require the Department of Corrections to collect and report information about the number of post-release probationers revoked for a technical violation and sentenced to a term of imprisonment in a technical violation center.

It is also worth noting that House Bill 585 provided the Department of Corrections with "the authority to impose graduated sanctions as an alternative to judicial modification or revocation, as provided in Sections 47-7-27 and 47-7-37, for offenders on probation, parole, or post-release supervision who commit technical violations of the conditions of supervision as defined by Section 47-7-2." Miss. Code Ann. § 47-7-38(1) (emphasis added). It would be unreasonable to conclude that the Legislature intended to impose a system of graduated sanctions for technical violations addressed by the Department of Correction's Field Officers, but not to impose a system of graduated sanctions for technical violations addressed by judges. Likewise, it would be unreasonable to conclude that the Legislature intended to impose a system of graduated

[5] House Bill 585 is available at http://billstatus.ls.state.ms.us/documents/2014/pdf/HB/0500-0599/HB0585SG.pdf. The Oversight Task Force mentioned in Section 47-5-11 was established through Section 68 of H.B. 585, which is codified at Miss. Code Ann. § 47-5-6.

sanctions for technical violations of probation, but not for technical violations of post-release supervision. *Cf. Tutwiler v. Jones*, 394 So.2d 1346, 1349 (Miss. 1981) (citation omitted) ("[T]he Court, in construing a statute, will not impute an unjust and unwise purpose to the Legislature when any other reasonable construction can save it from such imputation.").

CONCLUSION

It is clear that Section 47-7-37 provides the procedures and the substantive penalty for violations of post-release supervision, and thus that the 2014 amendments to the penalty provisions of Section 47-7-37 apply to violations of post-release supervision. The State has conceded that a Circuit Court may not rely upon Section 99-19-29 to revoke a term of post-release supervision, and has declined to offer any new support for the Circuit Court's declaration that the amendments to Section 47-7-37 are unconstitutional. For the reasons offered in our primary brief at pages 12-21 – which the State also declined to address – this Court should conclude that the Legislature did not exceed its authority when it amended the penalties that may be imposed upon revocation of a term of post-release supervision and that Mr. Atwood should have been sentenced to no more than ninety (90) days in either a technical violation center or a restitution center.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Reply Brief of the Appellant with the Clerk of the Court using the MEC system. I further certify that I sent copies of the foregoing by United States Mail to the following:

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This **8th** day of September, 2015.

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